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July 27, 2009

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Hearing Officer's Decision

Name of Case: Personnel Security Hearing

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Case Number: TSO-0711

This Decision concerns the eligibility of XXXXXXXXXX (hereinafter referred to as “the individual”) for access authorization under the regulations set forth at 10 C.F.R. Part 710, entitled "Criteria and Procedures for Determining Eligibility for Access to Classified Matter or Special Nuclear Material.”¹ For the reasons set forth below, I conclude that the individual should not be granted a security clearance at this time.²

I. BACKGROUND

The individual is employed by a Department of Energy (DOE) contractor, who requested a security clearance on the individual's behalf in connection with that employment. During the ensuing investigation, the local security office (LSO) obtained information about the individual that raised security concerns, and summoned him for interviews with a personnel security specialist in August and September 2008. After these Personnel Security Interviews (PSIs), the LSO referred the individual to a local psychiatrist (hereinafter referred to as “the DOE psychiatrist”) for an agency-sponsored evaluation. The DOE psychiatrist prepared a written report, setting forth the results of that evaluation, and sent it to the LSO. After reviewing this report and the rest of the individual's personnel security file, the LSO determined that derogatory information existed that cast into doubt

¹An access authorization is an administrative determination that an individual is eligible for access to classified matter or special nuclear material. 10 C.F.R. § 710.5. Such authorization will also be referred to in this Decision as a security clearance.

² Decisions issued by the Office of Hearings and Appeals (OHA) are available on the OHA website located at <http://www.oha.doe.gov>. The text of a cited decision may be accessed by entering the case number of the decision in the search engine located at <http://www.oha.doe.gov/search.htm>.

the individual's eligibility for access authorization. They informed the individual of this determination in a letter that set forth the DOE's security concerns and the reasons for those concerns. I will hereinafter refer to this letter as the Notification Letter. The Notification Letter also informed the individual that he was entitled to a hearing before a Hearing Officer in order to resolve the substantial doubt concerning his eligibility for access authorization.

The individual requested a hearing on this matter. The LSO forwarded this request to the Office of Hearings and Appeals, and I was appointed the Hearing Officer. The DOE introduced 12 exhibits into the record of this proceeding and presented the testimony of the DOE psychiatrist. The individual introduced one exhibit and presented the testimony of nine witnesses, in addition to testifying himself.

II. THE NOTIFICATION LETTER AND THE DOE'S SECURITY CONCERNS

A. The Notification Letter

As indicated above, the Notification Letter included a statement of derogatory information that created a substantial doubt as to the individual's eligibility to hold a clearance. This information pertains to paragraphs (j) and (l) of the criteria for eligibility for access to classified matter or special nuclear material set forth at 10 C.F.R. § 710.8.

Criterion (j) defines as derogatory information indicating that the individual "has been, or is, a user of alcohol habitually to excess, or has been diagnosed by a psychiatrist as alcohol dependant or as suffering from alcohol abuse." 10 C.F.R. § 710.8(j). As support for this criterion, the Letter cites what it claims is the diagnosis of the DOE psychiatrist that the individual suffers from Alcohol Dependence and Alcohol Abuse, with inadequate evidence of reformation or rehabilitation.³ The Letter also relies on statements made by the individual during the psychiatric evaluation and/or the PSI indicating that he: (i) has been arrested at least four times for offenses involving or pertaining to his alcohol usage, including a 1988 arrest for refusing to obey a police officer, a 1995 arrest for Driving While Intoxicated (DWI), and 2002 arrests for Driving Under the Influence of Alcohol (DUI) and for violating a restraining order; (ii) attempted suicide in February 2002 by drinking to a near-lethal blood alcohol content level of .35 and taking an overdose of an over-the-counter pain reliever and sleep aid; (iii) had an alcoholic blackout lasting over three days after this incident; (iv) was disciplined while in the Air Force during the late '90s, when he was unable to report for work because he was still intoxicated from a drinking binge the night before; (v) first drank to intoxication at age eight at his aunt's wedding; (vi) admitted drinking approximately two quarts of beer over a two-hour period on a monthly basis from 1981 to 1985 and drinking to intoxication twice a month from 1991 to 1995; (vii) currently consumes two to three 25-ounce beers twice a month; (viii) has experienced marital and possible health problems because of his drinking; and (ix) drank to intoxication two or three times during the two months leading up to his October 2008 interview with

³ In fact, the DOE psychiatrist did not diagnose the individual as suffering from Alcohol Dependence, but only from Alcohol Abuse. DOE psychiatrist's report, DOE Exhibit (DOE Ex.) 7 at 8.

the DOE psychiatrist, despite having indicated during his August and September 2008 PSIs that he had quit drinking.

Under criterion (I), information is derogatory if it indicates that the individual “has engaged in any unusual conduct or is subject to any circumstances which tend to show that [he] is not honest, reliable, or trustworthy; or which furnishes reason to believe that [he] may be subject to pressure, coercion, exploitation or duress which may cause [him] to act contrary to the best interests of the national security. Such conduct include[s], but [is] not limited to, criminal behavior” 10 C.F.R. § 710.8(I). As support for this criterion, the Letter cites the four alcohol-related arrests mentioned in the preceding paragraph.

B. The DOE’s Security Concerns

The individual generally does not contest the allegations about his alcohol use set forth in the Notification Letter. This derogatory information adequately justifies the DOE’s invocation of criteria (j) and (I), and raises significant security concerns. Excessive alcohol consumption such as that exhibited by the individual often leads to the exercise of questionable judgement or the failure to control impulses, and can therefore raise questions about an individual’s reliability and trustworthiness. Illegal acts also create doubt about a person’s judgement, reliability and trustworthiness. By their very nature, they call into question a person’s ability or willingness to comply with laws, rules and regulations. *See Revised Adjudicative Guidelines for Determining Eligibility for Access to Classified Information, The White House (December 19, 2005), Guidelines G and J.*

III. REGULATORY STANDARDS

The criteria for determining eligibility for security clearances set forth at 10 C.F.R. Part 710 dictate that in these proceedings, a Hearing Officer must undertake a careful review of all of the relevant facts and circumstances, and make a “common-sense judgment . . . after consideration of all relevant information.” 10 C.F.R. § 710.7(a). I must therefore consider all information, favorable or unfavorable, that has a bearing on the question of whether granting the individual a security clearance would compromise national security concerns. Specifically, the regulations compel me to consider the nature, extent, and seriousness of the individual’s conduct; the circumstances surrounding his conduct; the frequency and recency of the conduct; the age and maturity of the individual at the time of the conduct; the absence or presence of rehabilitation or reformation and other pertinent behavioral changes; the likelihood of continuation or recurrence of the conduct; and any other relevant and material factors. 10 C.F.R. § 710.7(c).

A DOE administrative proceeding under 10 C.F.R. Part 710 is “for the purpose of affording the individual an opportunity of supporting his eligibility for access authorization.” 10 C.F.R. § 710.21(b)(6). Once the DOE has made a showing of derogatory information raising security concerns, the burden is on the individual to produce evidence sufficient to convince the DOE that granting or restoring access authorization “will not endanger the common defense and security and will be clearly consistent with the national interest.” 10 C.F.R. § 710.27(d). *See Personnel Security Hearing, Case No. VSO-0013, 24 DOE ¶ 82,752 at 85,511 (1995) (affirmed by*

OSA, 1996), and cases cited therein. The regulations further instruct me to resolve any doubts concerning the individual's eligibility for access authorization in favor of the national security. 10 C.F.R. § 710.7(a).

IV. FINDINGS OF FACT AND ANALYSIS

A. The Diagnosis of Alcohol Abuse

In his report, the DOE psychiatrist based his diagnosis of Alcohol Abuse on the criteria for that disorder set forth in the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition (Text Revision) (DSM-IV-TR).⁴ Specifically, he found that, at the time of the evaluation, the individual engaged in recurrent substance use, resulting in a failure to fulfill a major role obligation at work. He stated that the individual's "continued consumption of alcohol to the point of intoxication, after committing to DOE that he was going to stop drinking" fulfills this criterion. DOE Exhibit (Ex.) 7 at 9. At the hearing, the individual contested this diagnosis by attempting to show that his job performance was adequate, even during the periods of time that he was consuming alcohol. Three of the individual's co-workers testified that they had never seen the individual exhibit any signs of inebriation or impairment of job performance due to alcohol use. Hearing Transcript (Tr.) at 11, 15-17, 24.

Despite this testimony, I find that the individual's recurrent alcohol use did result in a failure to fulfill major employment-related obligations. The individual's August 2008 PSI dealt almost exclusively with his alcohol use, and the September PSI touched on that usage, as well. During both of these PSIs, the interviewer explained in detail the DOE's security concerns relating to excessive alcohol use. DOE Ex. 10 at 76-77; DOE Ex. 11 at 88-89. On both occasions, the individual committed to abstaining completely from alcohol usage. DOE Ex. 10 at 64-65; DOE Ex. 11 at 64,

⁴ According to the DSM-IV TR, Substance Abuse is a "maladaptive pattern of substance use leading to clinically significant impairment or distress, as manifested by one (or more) of the following, occurring within a 12 month period:

- (1) recurrent substance use resulting in a failure to fulfill major role obligations at work, school, or home (e.g., repeated absences or poor work performance related to substance use; substance related absences, suspensions, or expulsions from school; neglect of children or household);
- (2) recurrent substance use in situations in which it is physically hazardous . . .;
- (3) recurrent substance related legal problems (e.g., arrests for substance related disorderly conduct);
- (4) continued substance use despite having persistent or recurrent social or interpersonal problems caused or exacerbated by the effects of the substance

Furthermore, the symptoms must have never met the criteria for Substance Dependence for the substance in question. DSM-IV TR at 199.

82-84.⁵ However, despite these security concerns and the individual's assurances, he drank two to three 25-ounce beers over two to three hours on a bi-weekly basis until October 2008, resulting in at least a mild level of intoxication on each occasion. DOE Ex. 7 at 6; DOE Ex. 10 at 70. Consequently, the individual failed to fulfill two major obligations: the obligation to adhere to commitments made to the DOE during the course of determining the individual's eligibility for access authorization, and the obligation to refrain from excessive alcohol use. In the absence of any expert testimony to the contrary, the DOE psychiatrist's diagnosis of Alcohol Abuse is adequately supported by the record in this proceeding.

B. The Individual's Rehabilitative Efforts

At the hearing, the individual attempted to demonstrate that, even if the DOE psychiatrist's diagnosis of Alcohol Abuse is correct, the individual should still be granted access authorization because he is currently exhibiting adequate evidence of rehabilitation from that disorder. The individual testified that he decided to permanently refrain from using alcohol in January 2009. Tr. at 96. After receiving the DOE psychiatrist's report in late January, he started attending Alcoholics Anonymous (AA) and an addictions treatment program sponsored by his church, both on a weekly basis. Tr. at 97, 98. His last drink was on New Year's Eve 2008, and he does not intend to ever consume alcohol again. Tr. at 94, 105. Toward that end, he said that he intends to continue attending AA and his church-based group, and he noted that there are a number of people, including his sister, his friends, his AA sponsor, and his church associates, to whom he could turn for support in maintaining his sobriety. Tr. at 105-106.

Based on this testimony and on the record as a whole, I find that the individual has diligently participated in the alcohol abuse programs offered by AA and by his church for approximately five and one-half months, and has abstained from all alcohol use for approximately six and one-half months. These rehabilitative efforts are commendable and entitled to mitigating value. However, I am not convinced that they constitute adequate evidence of rehabilitation or reformation. For the reasons set forth below, I believe that, at this stage of the individual's recovery, the chances of a relapse, and of serious consequences from such a relapse, remain unacceptably high.

⁵ At the hearing, counsel for the individual argued that the individual's statements during the August 2008 PSI (DOE Ex. 11) were equivocal at best, and did not constitute a "commitment" to quit drinking. I disagree. Although, if taken out of context, the individual's statements that "it's probably . . . about that time to quit again," (DOE Ex. 11 at 64) and "I think next payday will be my last [beer]," (*Id.* at 82), are somewhat indefinite, the individual, who is a devout Christian, later stated that he believed that God was leading him to abstain from all future alcohol use. *Id.* at 83-84. When read as a whole, the individual's statements during this PSI evince a clear commitment to cease using alcohol. Moreover, even if no such commitment had been made during the August 2008 PSI, the individual's more definitive statement during the September 2008 PSI ("Yes, no more drinking.") leaves no room for doubt as to whether the individual made a commitment to the DOE to abstain. DOE Ex. 12 at 65.

As an initial matter, the record indicates that the individual has previously attempted to stop drinking on multiple occasions, with periods of abstinence lasting as long as three years. DOE Ex. 7 at 4; DOE Ex. 10 at 64-65, DOE Ex. 11 at 53, 56, 64. However, the individual eventually returned to a pattern of excessive drinking. At the hearing, he indicated that this attempt would be different because, whereas before he thought he could quit on his own, this time he had a support system, consisting of “Christian men and women.” Tr. at 122. It is worth noting, though, that after his 2002 DUI and subsequent suicide attempt, the individual abstained from alcohol consumption for approximately three years, and participated in AA, with a sponsor, during this period. DOE Ex. 10 at 65; DOE Ex. 7 at 6; Tr. at 112. Nevertheless, despite his apparent usage of the AA support system, the individual resumed his pattern of excessive consumption in March 2007. DOE Ex. 7 at 6.

Furthermore, I am concerned that a return to excessive drinking could result in the type of serious defect in judgement and reliability that has plagued the individual in the past. As previously stated, the individual has had four alcohol-related arrests, including a DWI arrest after he drove at speeds in excess of 100 miles per hour, and a suicide attempt during which he drank to a near-lethal BAC level of 0.35. DOE Ex. 7 at 9.

Finally, the testimony of the DOE psychiatrist leads me to believe that the individual is not demonstrating adequate evidence of rehabilitation or reformation. In his report, the DOE psychiatrist stated that in order to meet this burden, the individual would have to participate in an alcohol abuse treatment program, such as AA, on at least a weekly basis for one year, while completely abstaining from alcohol use. DOE Ex. 7 at 12. After listening to all of the witnesses at the hearing, the DOE psychiatrist testified that he had not heard anything that would cause him to deviate from his recommendation of one year of counseling and abstinence. Tr. at 134.

Given these factors and the individual’s relatively lengthy history of excessive drinking, six and one-half months of abstinence and five and one-half months of counseling are simply not sufficient to convince me that his chances of returning to a pattern of excessive drinking are acceptably low. I therefore conclude that the individual has not demonstrated adequate evidence of reformation or rehabilitation from Alcohol Abuse.

C. Due Process Considerations

At the hearing, the individual argued that because the hearing took place approximately seven months after the DOE psychiatrist’s evaluation, he did not have sufficient time to demonstrate an adequate degree of rehabilitation or reformation, given the DOE psychiatrist’s recommendation of one year’s abstinence and counseling. According to the individual, this resulted in a denial of his constitutional right to due process.

In an Appeal of a previous personnel security decision, the OHA Director addressed and rejected a similar contention. *Personnel Security Review*, Case No. VSA-0121, July 14, 1997. In that case, he concluded that because there is no protected property or liberty interest in maintaining a security clearance, the constitutional requirements of due process do not apply. This is in accordance with federal case law and with a number of previous DOE personnel security decisions. *See, e.g., Jones v. Department of Navy*, 978 F.2d 1223 (Fed. Cir. Ct. App. 1992); *Dorfmont v. Brown*,

913 F.2d 1399 (9th Cir. Ct. App. 1990); *Personnel Security Review*, Case No. VSA-0226, February 18, 1999; *Personnel Security Review*, Case No. VSA-0439, October 9, 2001; *Personnel Security Hearing*, Case No. TSO-0294, August 3, 2006. Consequently, the individual's due process claim is without merit.⁶

D. Criterion L

At the hearing, the individual did not specifically address his four alcohol-related arrests, but instead attempted to mitigate the DOE's concerns under this criterion by demonstrating that he is rehabilitated from Alcohol Abuse. However, as set forth above, I find that the individual's chances of relapsing into a pattern of excessive alcohol are unacceptably high. I am further concerned that such a relapse could lead to a recurrence of the alcohol-related legal problems that the individual has previously experienced. Consequently, the DOE's security concerns under this criterion remain unresolved.

V. CONCLUSION

The individual has failed to mitigate the DOE's security concerns under criteria (j) and (l). I therefore conclude that he has not demonstrated that granting him access authorization would not endanger the common defense and would be clearly consistent with the national interest. Accordingly, I find that the individual should not be granted a security clearance at this time. The individual may seek review of this Decision by an Appeal Panel under the procedures set forth at 10 C.F.R. § 710.28.

Robert B. Palmer
Senior Hearing Officer
Office of Hearings and Appeals

Date: July 27, 2009

⁶ Moreover, the fact that a DOE security clearance hearing may be held before an individual is able to reach the rehabilitative milestones recommended by a DOE consultant psychiatrist or psychologist does not necessarily preclude that individual from showing adequate evidence of reformation or rehabilitation from a substance use or other mental or emotional disorder. In many previous Decisions, Hearing Officers have granted or restored clearances to individuals who failed to reach such milestones, either because the DOE psychiatrist or psychologist changed his or her opinion after hearing the testimony at the hearing, or because the Hearing Officer did not find the DOE expert's position, as set forth in his or her report or testimony, to be convincing. *See, e.g., Personnel Security Hearing*, Case No. TSO-0388, June 20, 2007 (DOE psychiatrist changed opinion as to length of abstinence required to demonstrate reformation or rehabilitation; clearance restored); *Personnel Security Hearing*, Case No. TSO-0095, January 12, 2005 (Hearing Officer recommended restoration of clearance despite shorter period of abstinence from alcohol and drug use than recommended by DOE psychiatrist).